IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1065 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MAHESH NAROTTAM RATHOD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1065 of 1994

MR US BRAHMBHATT for the appellant

Mr. B.D. Desai, APP, for Respondent

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: 04/12/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.H.KADRI)

1. The appellant, original accused No.1, by filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1974 ('Code' for short), has challenged the judgment and order dated October 5, 1994, passed by the learned Additional City Sessions Judge, Court No.11, Ahmedabad, in Sessions Case No.277 of 1993, by which judgment and order, the appellant was convicted under Section 302 of the Indian Penal Code ('IPC' for short) and sentenced to undergo R.I. for life. However, the appellant was acquitted for the offence under Section 135 of the Bombay Police Act.

2. Briefly stated, the prosecution case is as under: P.W.2, Puriben Jethalal, along with her husband, Jethalal, and her son, Vinod, were staying at Bhilwada, Near S.T. Bus-stand, Ramnagar Road, Ahmedabad. On May 30, 1992, P.W.2, Puriben, had gone to the house of her daughter, P.W.3, Jasiben, who was staying in the nearby locality. The distance between the house of P.W.2, Puriben, and her daughter P.W.3, Jasiben, was not far and, if one walks down the distance, it would take only ten minutes. When P.W.2, Puriben, was returning to her house at about 8.30 p.m., she saw that near Ram Barose Pan-shop, her son, Vinod, was caught hold by the original accused No.2, Narottambhai Kacharabhai Rathod (since acquitted), and his son, Shailesh Narottambhai (who was tried before the Juvenile Court), and the appellant was inflicting blows with a knife on the body of her son. P.W.3, Jasiben, was also present along with P.W.2, Puriben, as she had accompanied her mother while she was returning to her house. On receiving the injuries, Vinod had raised shouts. P.W.2, Puriben, and P.W.3, Jasiben, had also raised shouts for help and, therefore, the appellant, his father Narottambhai Kacharabhai Rathod and his brother, Shailesh, had run away from the place of the incident. After P.W.2, Puriben and P.W.3, Jasiben, had reached the place where Vinod was lying, they had enquired from him how the incident had taken place. Vinod had stated to his mother and sister that a quarrel had taken place between him and the appellant about the gambling money and, thereafter, the appellant had inflicted knife blows on his body. Vinod was seriously injured and there was profuse bleeding. In the meantime, P.W.1, Kanjibhai, who is the uncle of Vinod, had arrived at the place of the incident. He learnt that Vinod was taken to L.G. Hospital. A vardhi was sent to Amraiwadi Police Station by P.W. 9, Head Constable, Manubhai Chhotalal, who was duty constable at the hospital, that

Vinod Jethalal aged about 18 years residing at Bhilwada, Akash Ganga Society, Amraiwadi, who was injured on the abdominal part of his body by one Munna, was brought to the hospital by his neighbour, one Damjibhai Pujabhai Parmar, and, on examination by the Chief Medical Officer of the hospital, around 21.15 hrs, he was declared dead. P.W.2, Puriben and P.W.3, Jasiben, had also gone to the L.G. Hospital in another auto-rickshaw. As per the say of P.W.2, Puriben, Vinod had made oral statement before her that a quarrel had taken place between Vinod and the appellant with regard to money of gambling and, therefore, the appellant had given him knife blows. When the said oral statement was made by Vinod (hereafter referred to as 'the deceased') P.W.3, Jasiben, was also present.

3. On receipt of the Vardhi from the L.G.Hospital, P.W.10, PSI, Mr. P.V. Parmar, of Amraiwadi Police Station, had gone to the L.G. Hospital, around 22.15 hrs. P.W.10, PSI, Mr. P.V. Parmar, had recorded the complaint of P.W.1, Kanjibhai Tribhuvandas, who is the uncle of deceased Vinod. The said complaint was sent by P.W.10, PSI, Mr. P.V. Parmar, along with his report to Amraiwadi Police Station, which was registered as C.R. no.I-306/93. The investigation of the above crime was handed over to P.W.10, PSI, Parmar. P.W.10, PSI, Parmar, had held inquest of the dead body of deceased Vinod, and the said dead body was sent for post-mortem. The blood-stained clothes put on by deceased Vinod were seized under a panchanama. P.W.8, Dr. D.G. Desai, who was serving as Associate Professor in the Forensic Medicine of B.J. Medical College, had performed post-mortem of the dead body of deceased Vinod on May 31, 1993 from 10.00 a.m. to 10.30 a.m. P.W.10, PSI, Parmar, had recorded statements of the witnesses and had drawn panchanama of the place of the incident on the night of May 30,1993. At the time of drawing of the panchanama of the place of the incident, control earth, blood soiled earth and leather chappals were seized under a panchanama. P.W.10, PSI, Parmar, had arrested the original accused No.2, Narottam Kacharabhai Rathod, the father of the appellant, on May 31, 1993 and the appellant was arrested on June 1, 1993. While the appellant was in police custody, he had shown his willingness to produce the muddamal knife with which he had inflicted knife blows on the body of deceased Vinod. Independent panchas were called and, in the company of the panchas, the police personnel had gone to the place shown by the appellant, from where the appellant had produced the muddamal knife and its cover which was used in the commission of crime. A discovery panchanama under

Section 27 of the Indian Evidence Act, 1872, was drawn in the presence of the panchas and the blood-stained muddamal knife was seized. The appellant had also produced blood-stained clothes which were put on by him at the time of the incident. All the incriminating articles collected during the investigation were sent by P.W.10, PSI, Parmar, to the Forensic Science Laboratory ('FSL' for short). P.W.10, PSI, Parmar, had written a yadi to the Mamlatdar to prepare map of the scene of offence. On receipt of the report from the FSL, and, on completion of the investigation, chargesheet against the appellant and the original accused No.2, Narottam Kacharabhai Rathod, was filed in the Court of learned Metropolitan Magistrate, Court No.7, Ahmedabad, which came to be registered as Criminal Case No.1830 of 1993, and separate chargesheet against Shailesh Narottambhai, who was a juvenile offender, was also filed before the Juvinile Court, for the offences under Sections 302 and 34 of the Indian Penal Code. As the offence under Section 302 of the IPC is exclusively triable by the Court of Sessions, the learned learned Metropolitan Magistrate, Court No.7, Ahmedabad, by order dated September 2, 1993, committed Criminal Case No.1380 of 1993 to the Court of City Sessions, Ahmedabad, which came to be numbered as Sessions Case No.277 of 1993.

3. Charge Exh.4 was framed against the appellant and accused No.2, Narottam Kacharabhai Rathod, for the offences under Sections 302 and 34 of the Indian Penal Code and under Section 135(1) of the Bombay Police Act. The charge was read over and explained to the appellant and accused No.2, wherein, they pleaded not guilty and claimed to be tried. The prosecution, in order to prove charges framed against the appellant and the accused No.2, examined (1) P.W.1, Kanjibhai Tribhovan (complainant), Exh.13; (2) P.W.2, Puriben Jethalal, mother of the deceased, Exh.14; (3) P.W.3, Jasiben Kanjibhai, sister of the deceased, Exh.15, (4) P.W.4, Panch, Hiralal Ratilal Rathod, Exh.16; (5) P.W.5, Panch, Amrutbhai Hirabhai Solanki, Exh.18; (6) P.W.6, PSI of Amraiwadi Police Station, Ranjitsing Chainsing, Exh.20; (7) P.W.7, Panch, Harshadkumar Chaturbhai Patel (by mistake typed as Dashrathai Chaturbhai Patel) Exh.28; (8) P.W.8, Dr. D.G. Desai, Exh.30; (9) P.W.9, Duty Constable at L.G. Hospital, Manubhai Chhotalal Bhatt, Exh.33, and (10) P.W.10, PSI, Mr. U .V. Parmar, Exh.35. The prosecution produced documentary evidence such as panchanama of place of incident, Ex.19, vardhi issued from the L.G.Hospital,Exh.21, discovery panchanama of muddamal knife Ex.29, post-mortem notes Exh.31, inquest panchanama Exh.37, map of the place of the incident

Exh.38, report of the FSL Exh.40, register of 'Shanti Samiti' (Peace Committee) Exh.42, in which the presence of the mother of the appellant, Champaben, in the meeting held on May 30, 1993, was noted, etc. to prove the case against the appellant and accused No.2. After the evidence of the prosecution was over, the appellant and the accused No.2 were questioned generally and their statements came to be recorded under Section 313 of the Code. The defence of the appellant and the accused No.2 was of general denial. The appellant, in his further statement, stated that his name was not Munna but had admitted that the name of his mother was Champaben. The appellant and the accused No.2 did not lead any evidence in defence.

4. The learned City Sessions Judge, Court No.11, Ahmedabad, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned advocates for the parties, deduced that the prosecution had proved that deceased Vinod had died homicidal death. It was deduced that the evidence of eye-witnesses, P.W.2, Puriben and P.W.3, Jasiben, was reliable and trust-worthy and their presence at the place of the incident was proved by the prosecution beyond doubt. It was further deduced that there was no inconsistency in the evidence of the eye-witnesses as compared with the medical evidence. It was further deduced that the prosecution had established that the appellant was the person who was called as Munna Alias Mahesh Narottam, who had inflicted blows with the knife on the body of the deceased Vinod as the quarrel had taken place with regard to gambling amount. It was further deduced that, though both the eye-witnesses were related to the deceased, their evidence withstood the searching cross examination by the learned advocate for the defence, and it had gone uncontroverted that they were present at the place of the incident and they had witnessed the entire occurrence of the incident. It was further deduced that the original accused No.2, who is the father of the appellant, had not shared the common intention with the appellant to cause death of the deceased nor he had aided or abetted the appellant in infliction of knife blows to the deceased. It was further deduced that the appellant had selected vital parts of the body of the deceased for giving successive knife blows which had ultimately caused his death. It was further deduced that the appellant had acted cruelly and had taken undue advantage of the situation of the deceased who was unarmed. It was further deduced that the blows inflicted with the knife were sufficient in the ordinary course of nature to cause death of deceased Vinod. It was further deduced that the

evidence of the eye-witnesses was corroborated by the medical evidence as well as corroborative piece of evidence such as discovery of blood-stained knife and the report of the FSL. On the basis of abovereferred to conclusions, the learned City Sessions Judge, Court No.11, Ahmedabad, convicted and sentenced the appellant for the offence under Section 302 of the IPC and sentenced him to undergo R.I. for life, which has given rise to filing of this appeal. It may be noted that the original accused No.2, Narottambhai Kacharabhai Rathod, who is the father of the appellant, was acquitted for the offence under Section 302 read with Section 34 of the IPC.

5. Learned advocate, Mr. U.S. Brahmbhatt, appearing for the appellant, and learned Additional Public Prosecutor, Mr. B.D.Desai, have taken us through the entire record and proceedings of the case. We have heard the learned counsel for the parties and have also gone through the judgment of the learned Additional City Sessions Judge, Ahmedabad, in Sessions Case No.277 of 1993.

6. Learned advocate, Mr. U.S. Brahmbhatt, appearing for the appellant, has vehemently submitted that the prosecution had examined only related and interested witnesses and had kept back the important witness, namely, one Damjibhai, who had taken the deceased to the L.G. Hospital. It is submitted that the incident in question had taken place in a thickly populated commercial locality where many independent persons were present, but, the prosecution had deliberately examined only interested witnesses by keeping back the independent witnesses. It is submitted that, looking to the injuries found on the body of the deceased, it would not have been possible for the appellant alone to inflict the injuries and there was inconsistency between occular and medical evidence. Therefore, the benefit of doubt should be given in favour of the appellant. It is, next, contended that the presence of two eye-witnesses, P.W.2, Puriben, and P.W.3, Jasiben, at the place of the incident was highly doubtful, and both the witnesses were got up and, therefore, no reliance should be placed on their evidence. Learned advocate, Mr. U.S. Brahmbhatt, appearing for the appellant, has submitted that the discovery panchanama was not proved by the prosecution as Panch Harshadkumar was not examined, instead, one Dalpatkumar was examined. It is submitted that the identity of the appellant as Munna was not established beyond doubt as there were many persons called 'Munna' in

the locality where the incident had taken place. It is submitted that an adverse inference is required to be drawn against the prosecution for withholding the important evidence and not examining the independent witnesses, who were available at the place of the incident. It is submitted that the Investigating Officer had not carried out impartial investigation and, therefore, the benefit of doubt should be extended in favour of the appellant and the appeal be allowed and the conviction and sentence imposed on the appellant be quashed and set aside accordingly.

6. Learned APP, Mr. B.D. Desai, has, on the other hand, submitted that the evidence of two eye-witnesses was quite natural and their presence at the place of the incident was proved by the prosecution beyond reasonable doubt and their evidence cannot be discarded merely because they are closely related to the deceased. Learned APP, Mr. B.D. Desai, has further submitted that the evidence of both the eye-witnesses had remained undestroyed and withstood the searching cross examination by the learned advocate for the defence. It is submitted that, if the evidence of the eye-witnesses is trust-worthy so as to record a finding of guilt of the appellant on the basis of the same, mere non-examination of another witness by the prosecution would be of no consequence. It is submitted that non-examination of yet another witness who would have merely repeated the same story as was already narrated by the eye-witnesses, would not cause any dent or infirmity in the prosecution case. In support of the submissions, reliance is placed by learned APP, Mr. B.D.Desai, on the decision of the Supreme Court in the case of Babu Ram vs. State of UP, reported in 2002 SCC (Cri) 1400. Learned APP, Mr. B.D. Desai, has further submitted that the oral testimony of the eye-witnesses was corroborated by the medical evidence and the report of the FSL and Serologist which had proved that the blood group of the deceased was found at the place of the incident. It is submitted by the learned APP that the identity of the appellant as Munna was sufficiently proved by the prosecution. Therefore, there was no room to doubt that the appellant was known as Munna who had assaulted the deceased. At the end, it is submitted that the prosecution had brought home the guilt against the appellant beyond reasonable doubt and, therefore, the appeal be dismissed and the conviction and sentence on the appellant be confirmed

7. We have carefully examined the record and proceedings and appreciated oral as well as documentary evidence. It is not in dispute that deceased Vinod had

died homicidal death on May 30, 1993. The oral testimony of P.W.8, Dr. D.G. Desai, and the post-mortem report Exh.31 had proved beyond doubt that deceased Vinod had died homicidal death due to infliction of knife injuries on the vital parts of the body of the deceased. Therefore, the finding of the learned City Sessions Judge, that deceased Vinod had died homicidal death, deserves to be confirmed.

8. On the day of the incident, P.W.2, Puriben, who is the mother of the deceased, had gone to the house of her daughter, P.W.3, Jasiben, at around 8.30 p.m. which was at a walking distance of ten minutes and she was returning to her house from the house of her daughter, P.W.3, Jasiben. P.W.3, Jasiben, had also accompanied her mother while she was walking in the direction of her house. When both of them had reached near Ram Bharose Pangalla, they saw that deceased Vinod was caught hold of by the father of the appellant as well as his brother, Shailesh, a juvenile offender. They also saw that the appellant was inflicting blows with knife on the vital parts of the body of the deceased. They deposed that the deceased had raised shouts because of pain and both of them had rushed to the deceased by raising shouts. When the assailants saw that P.W.2 Puriben and P.W.3, Jasiben, were rushing towards them, they had run away from the place of the incident. It is true that both the eye-witnesses are closely related with the deceased, but, having gone through their evidence minutely, we are of the view that the presence of both the witnesses was natural at the place of the incident. By no stretch of imagination, it can be said that they are got up and concocted witnesses. They had withstood the searching cross examination by the learned advocate for the defence and their evidence had gone undestroyed. Both the witnesses had identified, during their oral testimony, the appellant as 'assailant' who had inflicted the knife injuries on the deceased. The appellant is the son of a the social worker of the locality, namely, Champaben. Said Champaben had attended the meeting of the Peace Committee which was held on May 30, 1993. The appellant, the deceased, and the witnesses were residents of the same locality and, therefore, it is quite natural that both the witnesses knew the appellant and his family. The appellant was known as Mahesh alias Munna and was more popularly known by his nick name 'Munna' in the locality. We do not find any substance in the argument of the learned advocate for the appellant that the prosecution had failed to prove the identity of the appellant as the person who had inflicted knife injuries on the deceased. It was suggested to the Investigating

Officer in his cross examination that there were many other persons in the same locality who were called by name 'Munna', but, the Investigating Officer had deposed that the appellant, who was also known by name of 'Munna', was the person who had caused the murder of the deceased by inflicting the knife blows. The other corroborative evidence of discovery of muddamal knife from the appellant and the blood stained clothes put on by the appellant had also proved that the appellant was the person who had caused the murder of the deceased by inflicting the knife blows. The deceased himself had made an oral dying declaration before P.W.2 Puriben and P.W.3, Jasiben, that the appellant [Munna], because of the quarrel with regard to gambling amount, had inflicted knife blows on the deceased. This oral dying declaration given by the deceased before P.W.2 Puriben and P.W.3, Jasiben, also lends corroboration to the case of the prosecution that the appellant was the person who had inflicted knife blows on the deceased. In view of the above-stated set of evidence, we are of the view that the identity of the appellant as Munna is fully established and it is proved beyond doubt that the appellant had inflicted knife blows on the deceased.

9. The submission of the learned advocate for the appellant that the evidence of two eye-witnesses who are mother and sister of the appellant, was highly doubtful, and they being interested and related witnesses, no reliance should be placed on their evidence, is devoid of any merit and deserves to be rejected. In Gangadhar Behera and others vs. State of Orissa 2002 AIR SCW 4271 the Apex Court while dealing with the point with regard to appreciation of evidence of interested or related witnesses has held as under :-

> "We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.
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> In Dalip Singh v. The State of Punjab (AIR 1953 SC 364) is has been laid down as under:-

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid laid for such a criticism and the mere fact of relationship for from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

The above decision has since been followed in Guli Chand v. State of Rajasthan 1974 (3) SCC 698) in which Vadivelu Thevar v. State of Madras (AIR 1957 SC 614) was also relied upon.

We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh's case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:

"We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a

> fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan' (AIR 1952 SC 54 at p.59.) We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel."

Keeping in mind the above principle laid down by the Apex Court in the case of Gangadhar Behera (supra), we have minutely gone through the evidence of two eye-witnesses who are closely related to the deceased, and we are satisfied that their evidence is much reliable and trust-worthy, and they have not falsely involved the present appellant to the commission of the crime.

10. The learned advocate for the appellant has submitted that the injuries found on the back of the deceased was not possible if the appellant alone had inflicted the knife blows and there was inconsistency between the oral as well as medical evidence and therefore the benefit of doubt should be extended in favour of the appellant. Since the appellant had inflicted successive blows with the knife on various parts of the body of the deceased, the witnesses would not be in a position to state at which parts of the body the fatal blows were inflicted. The appellant, in quick succession, had inflicted blows with the knife, and the deceased might have changed his position while receiving the injuries. The power of observation of the witnesses may differ from each other, but, the oral testimony cannot be thrown away on the ground that there was inconsistency in the oral evidence as compared to the medical evidence. The medical evidence indicates that there were as many as eight injuries found on the body of the deceased. The witnesses might not precisely notice which injury was caused at which part of the body. The deceased might have tried to save himself from the assault by turning the position of his body and thereby he might have received the injuries on his back. When the appellant had inflicted successive knife blows, it was quite possible that, the deceased might have turned back to save himself and might have sustained injury on his back. The fact that the injury as per the post-mortem report was found on the back, was not enough to discard the testimony of the eye-witnesses. In our view, there is no inconsistency in the oral evidence as compared to the medical evidence and the injuries mentioned in the post-mortem notes.

11. It is also vehemently submitted by the learned advocate for the appellant that the Investigating Officer P.W.10, PSI, Mr. P .V. Parmar, had carried out dishonest investigation and had not projected the true picture before the Court. In our view, the Investigating Officer had carried out the investigation in the right earnest. Many allegations were made during cross examination of the Investigating Officer that, as the social worker, Champaben, who happens to be the mother of the appellant, had made applications against the Investigating Officer that he was supporting the illegal bootlegging in the locality, a false case was made out against the appellant and other family members. In our view, mere allegation is not enough to prove the fact against the Investigating Officer. No applications making allegations against the Investigating Officer were produced during the trial to substantiate the allegations made against the Investigating Officer. In our view, the allegations made against the Investigating Officer are not proved so as to draw an inference that he had carried out dishonest investigation.

12. The oral testimony corroborated by the medical evidence and the report of the FSL had proved beyond doubt that the appellant and the appellant alone was the assailant, who had inflicted knife blows on vital parts of the body of the deceased which had caused his death. The appellant had acted cruelly and had selected vital parts of the body of the deceased for inflicting the knife blows. The appellant had taken undue advantage of the situation of the deceased who was unarmed, for inflicting the knife blows on the deceased. Looking to the evidence of P.W.8, Dr. Desai, the injuries which were caused by means of knife on the body of the deceased were sufficient in the ordinary course of nature to cause death. In our view, the offence committed by the appellant would squarely fall within the four corners of Section 300 of the IPC.

13. In the result, this appeal is devoid of merits and, therefore, is dismissed. The conviction of the appellant under Section 302 of the Indian Penal Code and the sentence imposed on him to undergo R.I. for life, recorded by the learned Additional City Sessions Judge, Court No.11, Ahmedabad, in Sessions Case No.277 of 1993, are confirmed. The muddamal be destroyed as per the directions contained in the impugned judgment and order.

(M.H. Kadri, J.)

(M.C. Patel,J.)

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